Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1457

WILSON RICHARDSON, A/K/A BUDDY, PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ISADORE S. BERNSTEIN,
1019 Assembly Street,
Columbia, South Carolina
29201,
Attorney for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	9
Appendix	11
Index to Appendix	12

CITATIONS

	Page
Bennett v. United States, 227 U. S. 333, 33 S. Ct. 288	6
Berger v. United States, 295 U. S. 78, 55 S. Ct. 629	4, 6, 7, 8
Blumenthal v. United States, 332 U. S. 539, 66 S. Ct. 248	7
Cole v. State of Arkansas, 333 U. S. 196, 68 S. Ct. 514	8
De Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255	9
Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417	6
Harrison v. United States (C. C. A.), 200 F. 662	6
Kotteakos, et al. v. United States, 329 U. S. 750, 66 S. Ct. 1239	4, 5
United States v. Wills (C. C. A.), 36 F. 2d 855	6
In re Oliver, 333 U. S. 257, 68 S. Ct. 499	8

OTHER REFERENCES

Amendment V, United States Constitution	2
Amendment VI, United States Constitution	2

Supreme Court of the United States

OCTOBER TERM, 1978

No.

WILSON RICHARDSON, A/K/A BUDDY, PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit dated and entered in this case on December 26, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals was filed on December 26, 1978, and is not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether petitioner suffered substantial prejudice under the circumstances disclosed in the record from being convicted of a conspiracy by evidence which related to a separate and distinct conspiracy from that charged in the indictment, there being no proof of the conspiracy as charged.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V.

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

STATEMENT OF THE CASE

Petitioner was indicted in May of 1977 by a Federal Grand Jury, along with one Levi Leysath, under an indictment charging conspiracy to distribute heroin and distribution of heroin, in violation of Title 21, U.S. Code, Section 812(a)(1), and 846, and Title 18 U.S. Code, Section 2. Count One, the conspiracy count, charged that "defendants, Wilson Richardson and Levi Leysath, and various other persons unknown" did conspire to distribute heroin, from about February 1, 1977 until about April 14, 1977. The only overt act charged in furtherance of the conspiracy was that the defendants met in the vicinity of Read Street on April

4, 1977, and that Levi Leysath obtained six grams of heroin from a child pointed to by Wilson Richardson.[1]

The case came on for trial in the United States District Court on June 6, 1977. The evidence adduced on behalf of the Government failed to establish the conspiracy between petitioner and Leysath as charged. The trial judge recognized this failure of proof but, nevertheless, denied petitioner's motion for acquittal and left for the determination by the jury whether the Government proved a conspiracy to distribute heroin between petitioner and the witness, Holliday, notwithstanding there was no such conspiracy charged. The trial judge instructed the jury as to the conspiracy count as follows: (Tr. 199, L. 16).

"Now, in connection with the first count, which is the conspiracy count, I explained conspiracy to you yesterday, which is an agreement, an unlawful agreement, but in connection with this particular indictment, and the testimony that has been presented, there is no testimony to support the Government's claim that there was a conspiracy between Wilson Richardson and Levi Leysath, because the testimony of both of those people deny that there was any type of an agreement and the most that could be said, if you took it in the light most favorable to the Government, is that one was a buyer, and the other was a seller. So, that does not prove conspiracy as between Mr. Richardson and Mr. Leysath. That leaves the question for you to decide under all the evidence in the case, as to whether the Government has proved beyond a reasonable doubt that there was a conspiracy to distribute heroin between the Defendant, Richardson, and the Witness, Holliday. And we will go into that as to what conspiracy means. But in con-

[1] Count Two charged only Leysath with distribution. Count Three charged both petitioner and Leysath with distribution. Holliday is not named in the indictment.

nection with the first count, I rule, as a matter of law, that there was no conspiracy regarding Mr. Richardson and Mr. Leysath, but it's for you to decide whether there was a conspiracy between Mr. Richardson and Mr. Holliday."

Petitioner was convicted under the conspiracy count as well as the substantive count. On August 2, 1977, petitioner was sentenced to eight years on the conspiracy count and ten years on the substantive count, said sentences to run consecutively and not concurrently.

Petitioner is twenty-eight years of age and has no previous conviction.

REASONS FOR GRANTING THE WRIT

Petitioner urges the following reasons for granting the writ:

1. The decision of the Court of Appeals recognizing that a variance existed between the conspiracy charged and the conspiracy proved but nevertheless holding this error harmless is not in accord with the principles enunciated in the applicable decisions of this Court, particularly *Kotteakos, et al. v. United States,* 328 U.S. 750, 66 S. Ct. 1239, and *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629.

In *Kotteakos,* this Court overturned the conviction of petitioners of conspiracy to violate provisions of the National Housing Act. The indictment charged a single conspiracy naming thirty-two persons as defendants; the Government, however, proved eight or more distinct conspiracies having a single central figure. The trial court's instruction that the indictment charged but one conspiracy and that the Government would have to prove that each defendant was a member of that conspiracy was held to be erroneous as applied to the proof made and that the error pervaded the entire charge. On this point, the opinion notes: (pg. 1249, 50)

> "The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans. This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character."

By analogy, under the circumstances herein, a single conspiracy was charged, naming only petitioner and Leysath as the conspirators and alleging as an overt act the sale of heroin by petitioner to Leysath on April 4, 1977. Proof of this allegation did not establish the conspiracy, a fact recognized both by the trial judge and the Court of Appeals. The contention of appellant that a variance existed between the conspiracy charged and the conspiracy proved was upheld on appeal, although the error was deemed harmless. As was pointed out in *Kotteakos,* however, notwithstanding that the evidence may have been sufficient to convict in a separate trial, (page 1253).

> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if it had been presented in separate trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of Section 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."

In *Berger v. United States,* supra, in defining the scope of Section 269 of the Judicial Code, as amended (28 U.S.C.A. 391),[2] the Court noted:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Bennett v. United States,* 227 U.S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; *Harrison v. United States,* (C.C.A.) 200 F. 662, 673; *United States v. Wills,* (C.C.A.) 35 F. 2d 855, 857. *Cf. Hagner v. United States,* 285 U.S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861."

Although, in *Berger,* a variance was found to exist between the conspiracy count and the proof, it was held not prejudicial under the peculiar circumstances therein, in that the proof disclosed two conspiracies instead of one, each within the words of the indictment. The Court noted that:

> ". . . the objection is not that the allegation of the indictment does not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof included more."

The fact that there was proof of a conspiracy with which Berger was not connected, in addition to the proof connecting him with the conspiracy as charged, was held not prejudicial.[3]

[2] This provision is embodied in Section 52(a) Federal Rules of Criminal Procedure reading: (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Unlike *Berger,* however, the objection here is that the allegations of the indictment do *not* describe the conspiracy of which petitioner was convicted. The indictment charges a conspiracy between petitioner and Leysath to distribute heroin in violation of law, and the one overt act charged in furtherance of that conspiracy was the sale to Leysath on April 4, 1977. The proof was deemed insufficient to establish the conspiracy as such; the conviction of petitioner was as to a separate and distinct conspiracy not embodied within the allegations of the indictment.

Under the circumstances disclosed in the record, it is manifest that substantial prejudice has resulted to petitioner. Unquestionably, he was taken by surprise by the admission of Holliday's testimony. Holliday's statement previously given to the Government was furnished to petitioner's counsel only the evening before he was to testify. The testimony was extremely vague in terms of the times and places of his alleged dealings with petitioner and many apparently related to times other than the period covered in the indictment. There were no specific incidents related to which petitioner could address himself in rebuttal testimony. Petitioner was placed in the awkward position of being unable to defend himself against these general accusations; nor could he reconstruct his whereabouts on the occasions referred to in Holliday's testimony since they lacked specificity as to time and place. The testimony of Holliday was so general that counsel could not have made any meaningful investigation even if a continuance had been granted. (Tr. 150-172.)

[3] Compare *Blumenthal v. United States,* 332 U.S. 539, 66 S. Ct. 248, where petitioner urged that the proof, in variance from the indictment, showed that there was more than one conspiracy. Although insisting that only one conspiracy was proved, the Government conceded that prejudice has resulted if the evidence proved more than one conspiracy.

It is important to note that the testimony adduced by the Government reflects no unity of purpose nor common design among the three alleged conspirators. Holliday's testimony related to incidents wholly disconnected from those specified in the indictment. There was no proof whatsoever of any transaction linking Holliday and Leysath. The proof at best merely established a buyer-seller relationship between the petitioner and Leysath and a relationship of an entirely different character between the petitioner and Holliday. Petitioner's dealings with Leysath were held to be non-conspiratorial; those between petitioner and Holliday, although smacking of a conspiracy, nevertheless were beyond the purview of the indictment.

In view of the material variance between the conspiracy charged and the conspiracy proved, as recognized by the Courts below, substantial prejudice to petitioner results further in that he is accorded no protection from another prosecution for the same offense. *Berger v. United States,* supra.

2. The actions of the Courts below deny petitioner his rights under the Sixth Amendment that

> "In all criminal prosecution, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation;"

and deprive him of his liberty without "due process of law" in violation of his Fifth Amendment rights. As was so aptly stated in *Cole v. State of Arkansas,* 333 U.S. 196, 68 S. Ct. 514:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In *re Oliver,* 333 U.S. 257, 68 S. Ct. 499, and cases there cited. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. State of Oregon,* 299 U.S. 353, 57 S. Ct. 255, 259, 81 L. Ed. 278."

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant this petition for a writ of certiorari and reverse the judgment of the Court below.

Respectfully submitted,

ISADORE S. BERNSTEIN,
Attorney for Petitioner.

APPENDIX

INDEX TO APPENDIX

PAGE

Decision of Court of Appeals 13

DECISION OF COURT OF APPEALS

(Argued December 8, 1978. Decided December 26, 1978)

Before HAYNSWORTH, Chief Judge, BRYAN AND FIELD, Senior Circuit Judges.

John W. Foard (R. W. Mance III on brief) for Appellant; Eric Wm. Ruschky, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant, Wilson Richardson, appeals from his conviction on two counts alleging drug-related offenses. He proffers two assignments of error.

We reject his contention that the government presented insufficient proof on the distribution of heroin charge contained in Count III. As to Count I, we agree that a variance existed between the conspiracy charged and the conspiracy proved. However, we hold this error harmless. In so ruling, we are principally impressed by the government's release of Holliday's statement on the day prior to his testimony, the immediate efforts of Richardson's counsel to develop an attack on Holliday's story, and the failure of the defense to come forward at this stage with any evidence discovered after Richardson's conviction indicating prejudice.

AFFIRMED.